IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Case No. 75-1287

ANCHORAGE OFFICE BUILDING COMPANY,
A Limited Partnership,
and
ANCHORAGE-HYNNING & CO., A Limited Partnership,
and
CLIFFORD J. HYNNING, Trustee for and Managing
General Partner of said Limited Partnerships,
Petitioners,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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COUNTER-STATEMENT OF THE CASE

This case involves the planning and construction of the rapid rail transit system in the nation's capital. Petitioners claim that as a result of construction activities by the Washington Metropolitan Area Transit Authority's [1] independent contractor, their property was taken without just compensation and that

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[1] Hereinafter, WMATA.

WMATA maintained a public and/or private nuisance. They also claimed that there was an alternative location for the vent shaft constructed adjacent to their property. Finally, Petitioners assert a theory of absolute liability based on the District of Columbia Building Code.

At the close of Petitioners' case in the trial court, Respondent WMATA moved to dismiss Petitioners' case pursuant to Rule 41(b) of the Federal Rules of Civil Procedure. Thereafter the Court did dismiss, finding that Petitioners had failed to establish a *prima facie* case on any theory. Judge Flannery denied Petitioners' Motion for a new trial. The United States Court of Appeals for the District of Columbia affirmed without opinion.

REASONS FOR DENYING THE WRIT

1. There Is No Legal Issue To Be Resolved on Certiorari

The case law controlling the present case has been settled for decades. There is no conflict to be resolved on certiorari. Petitioners rely primarily upon a theory of a constitutional taking under the Fifth Amendment. However, their evidence tended to prove only the partial, temporary interference which necessarily resulted from WMATA construction in public space. Decisions of this Court and the District of Columbia courts are in accord that a partial temporary interference is not a taking but is *damum absque injuria.*

As early as 1857, in the case of *Smith* v. *Corporation of Washington,* 61 U.S. 135 (1857), this Court held that since the City of Washington had authority to change the grade of the street in front of plaintiff's property, the city was not liable in damages for inconvenience and expense to the plaintiff occasioned by

that construction. See also *Osborn* v. *District of Columbia,* 63 App. D.C. 277, 72 F.2d 70 (1934); *Ralph* v. *Hazen,* 68 App. D.C. 55, 93 F.2d 68 (1937).

Similarly, in *Northern Transportation Co.* v. *Chicago,* 99 U.S. 635 (1879), this Court held that the construction by the City of Chicago of a tunnel under the Chicago River, even though it completely blocked access to plaintiff's docks and forced plaintiff to rent other docks, was not a taking within the meaning of the constitutional provision. See also *George Washington Inn, Inc.* v. *Consolidated Engineering Co.,* 64 App. D.C. 138, 75 F.2d 657 (1935); *Lund* v. *St. Paul,* 31 Wash. 286, 71 P. 1032, 61 L.R.A. 506 (1903); *Farrell* v. *Rose,* 253 N.Y. 73, 170 N.E. 498 (1930).

Finally, the most recent reported case in the District of Columbia is *Meyers* v. *District of Columbia,* 17 F.R.D. 216 (D.D.C. 1955). On defendant's motion for summary judgment in that case, the United States District Court held that absent some evidence of negligence or unreasonable delay, plaintiffs could not recover for the interference with their business which resulted from construction of an underpass under Dupont Circle.

As may be gleaned from the *Meyers* case, *supra,* there are two exceptions to the rule that consequential damages to an adjoining property owner due to a public improvement are noncompensable. The first is if the construction at issue is beyond the authority of the public body performing it.[2] Petitioners here neither alleged nor attempted to prove that Repsondent

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[2] See also *Smith* v. *Corporation of Washington,* 61 U.S. 135 (1857); *Northern Transportation Company* v. *Chicago,* 99 U.S. 635 (1879).

WMATA was not authorized to construct portions of the transit system adjacent to Petitioners' property. The second basis for liability arises if the construction is negligently performed or negligently delayed.[3] Petitioners withdrew their allegations of negligence (Tr. pp. 321-322), dismissed their case against the contractor (Tr. p. 322), and failed to introduce any evidence that the alleged delay was unreasonable or negligent (Memorandum Opinion, U.S. District Court for the District of Columbia, dated October 2, 1974, reprinted in Petitioners' Brief, p. A-8; hereinafter Memorandum Opinion).

The cases cited by Petitioners in support of the proposition that the Anchorage property was "taken" without just compensation in violation of the Fifth Amendment to the United States Constitution are inapposite. The cited cases deal with permanent deprivation of all or part of a plaintiff's property.[4] Respondent concedes that had it erected barricades depriving Petitioners of access to their building forever, Respondent would have "taken" it. See *Brownlow* v. *O'Donoghue Brothers, Inc.*, 51 App. D.C. 114, 276 F. 636 (1921). Unlike *Brownlow*, *supra*, or *Richards* v. *Washington Terminal Co.*, 233 U.S. 546 (1914), the interference here complained of was partial and temporary. Petitioners have cited no case in any jurisdiction, and Respondent knows of none, where a partial temporary

[3] See also *Lund* v. *St. Paul*, 31 Wash. 286, 71 P. 1032, 61 L.R.A. 506 (1903); *Farrell* v. *Rose*, 253 N.Y. 73, 170 N.E. 498 (1930).

[4] See, *e.g.*, *Armstrong* v. *United States*, 364 U.S. 40 (1960); *Pumpelly* v. *Green Bay Co.*, 80 U.S. 166 (1872); *Richards* v. *Washington Terminal Co.*, 233 U.S. 546 (1914); all cited by Petitioners.

interference during a public works project was held to be a taking under the Fifth Amendment. In any event, the law in this jurisdiction is clear and there is no conflict to be resolved by this Court on a writ of certiorari.

Petitioners also assert but did not prove a cause of action based on a nuisance theory. The law on nuisance is equally well settled. In order to establish a claim for public or private nuisance, Anchorage had to have proved a substantial interference with their property rights, unreasonable conduct or activity on the part of WMATA, and avoidability of the harm caused. W. L. Prosser, *Handbook of the Law of Torts*, Ch. 15, pp. 577-583 (4th ed. 1971), *passim*. A recovery for private nuisance requires a showing, in addition to the elements above, that the interference was not outweighed either by the social utility of defendant's conduct or the public interest. Prosser, pp. 596-599 *passim*. To recover for a public nuisance, plaintiffs have the further burden of proving that the damage to them was different, both in kind and degree, from that suffered by other members of the public. Prosser, pp. 586-587. *Meyers* v. *District of Columbia*, 17 F.R.D. 216 (D.D.C. 1955).

In addition, Petitioners asserted a somewhat amorphous theory based on their allegation that the vent shaft constructed adjacent to their property should have been located elsewhere. Not only did Petitioners fail to show that there was a superior alternative location for the vent shaft but, even if they had, WMATA's decision on the location of the vent shaft is not a proper subject for judicial review. *Berman* v. *Parker*, 348

U.S. 26 (1954); *Bootery, Inc.* v. *WMATA*, 326 F.Supp. 794 (D.D.C. 1971).[5]

Petitioners' final theory, first advanced at trial, is that Respondent WMATA was absolutely liable under Article 22 of the District of Columbia Building Code. Despite five queries by the trial court to Petitioners' counsel[6] and an opportunity to brief the issue,[7] Petitioners never introduced evidence of causation and never referred the court or opposing counsel to any case which relieved them of the burden of proving who or what caused the damage allaged.

2. This Case Is Not a Proper Vehicle for the Resolution of Any Issue.

There is a second reason for denying the writ. Even if there were important unresolved legal issues in regard to construction of the subway system in Washington, the record in this case is not a proper vehicle for presenting them. Petitioners failed to establish a *prima facie* case on any theory. They failed to introduce evidence sufficient to prove a constitutional taking or even a substantial interference. They showed only that ingress and egress to the Anchorage Building was via a covered walkway installed at Petitioners' request and that tenants complained and were more difficult to find during the construction period (Memoranda Opinion, pp. A-10, 11). Moreover, Petitioners acknowledge that access was never completely barred (Petition, p. 6) and withdrew their allegations of negligence (Tr. pp. 321-322).

[5] As an agency and instrumentality of the three signatory jurisdictions (Washington Metropolitan Area Transit Authority Compact of 1966, PL 89-774, 80 Stat. 1324, note following D.C. Code 1-1431) engaged in a public works project, WMATA's planning decisions are not subject to challenge unless they are arbitrary, capricious, or irrational.

[6] Tr. pp. 205, 206, 210, 284 and 288.

[7] Tr. p. 295.

Again, Petitioners proved only the facts set forth above and did not prove substantial or unreasonable interference to support a nuisance claim. In addition, Petitioners were unable to show that the harm they suffered was any different from the harm suffered by other members of the public (Memorandum Opinion, p. A-16). Finally, even if Petitioners had shown a substantial interference with their property, the interference would be *damnum absque injuria,* under the case law precedent cited above, in the absence of evidence of negligence or negligent delay.[8]

Therefore, if there are any issues of constitutional dimension raised by WMATA construction, of justice and fairness under the Fifth Amendment, they should be reviewed by this Court in an appropriate case where each element upon which liability is predicated has been proved in the trial court. This is not such a case.

3. Petitioners Had a Fair Trial.

Petitioners have described a number of actions and rulings of the trial judge which they believe denied them a fair trial. Contrary to Petitioners' lengthy description of the trial of this case, the trial judge gave Petitioner Hynning countless opportunities to rectify glaring deficiencies in his case. The transcript of the trial reveals that Judge Flannery bent over backwards to aid Mr. Hynning, who appeared *pro se* and on behalf of other Petitioners. While none of Petitioners' arguments on these rulings would justify

[8] *Meyers* v. *District of Columbia*, 17 F.R.D. 216 (D.D.C. 1955).

a review of the trial court's action by this Court on a writ of certiorari, Respondent here briefly reviews several of the points raised in order to correct certain misstatements by Petitioners.

Petitioners are apparently convinced that the trial judge denied them a fair trial by bifurcating the trial, refusing to hear evidence of damages, and then ruling that they had failed to prove particular harm. This argument is the illogical conclusion of a faulty premise; that is, Petitioners believe that a trial which is bifurcated into one on liability and one on damages relieves the Respondent in that trial of the necessity of proving harm as an element of liability. Obviously the fact of harm, as distinguished from the quantum of damages, is a necessary element in most, if not all, tort claims. In addition, in proving a claim for public nuisance, a plaintiff must prove particular harm, or as Judge Flannery stated it in the trial court below--"damage different from that sustained by the general public" (Memorandum Opinion, p. A-16). Petitioners introduced *no* evidence of particular harm.[9]

Petitioners also assert that Judge Flannery discarded the law of the case. Reduced to its simplest form, Petitioners' argument is that having held in 1973 that Petitioners' Complaint stated a cause of action, the trial judge was precluded, by the law of the case, from holding in 1974 that Petitioners failed to prove that cause of action. Judge Flannery simply afforded Petitioners the opportunity, if they could, to

[9] The Answer to Plaintiffs' Interrogatory No. 13, which Petitioners believe shows particular harm, was never offered into evidence by Petitioners. (Tr. p. 314). Even if it had been offered and admitted, it showed nothing.

prove permanent denial of access, negligent delay, arbitrary or capricious actions, particular harm, causation and other essential elements of liability. Suffice it to say that if Petitioners were persuasive in this argument, there would be no need for trials since stating a claim would automatically entitle a plaintiff to judgment on the merits.

Finally, Petitioners challenge the trial court's finding that they consented to much of the interference they endured and that the underpinning activity lasted 90 days. Petitioners themselves introduced the evidence of consent (J.A., p. 223) and the evidence of the duration of underpinning (J.A., pp. 194, 211, 217). Petitioners are bound by their own evidence. Moreover, neither finding of fact is prejudicial even if either had been erroneous. A finding of no consent by the trial judge would not have supplied the deficiencies in Petitioners' *prima facie* case. A finding that the underpinning lasted five years would not have established a *prima facie* case in the absence of proof that a five-year delay was unreasonable or negligent. *Meyers* v. *District of Columbia,* 17 F.R.D. 216 (D.D.C. 1955); *Farrell* v. *Rose,* 253 N.Y. 73, 170 N.E. 498 (1930).

No recitation of authority is necessary to show that Petitioners must prove causation in order to prevail on a claim of absolute liability under Article 22 of the D. C. Building Code.

CONCLUSION

The Petition for Certiorari presents no important legal issue for this Court to resolve. Even if any issues remain uresolved in connection with Metro construc-

tion, this record would not be an appropriate vehicle. Petitioners received a fair trial and failed to prove a case. Therefore, the Petition should be denied.

Respectfully submitted,

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